APPENDIX A
LIST OF COMMENTERS

Comments in Pick-and-Choose Proceeding, CC Docket No. 01-338

Comments	Abbreviation
American Farm Bureau, Inc. Anew Telecommunications Corporation d/b/a Call America Creative Interconnect, Inc. Enhanced Communications Network, Inc. Utilities Commission of New Smyrna Beach A+ American Discount Telecom, LLC	AFB *et al.*
Association for Local Telecommunications Services	ALTS
BellSouth Corporation	BellSouth
California Public Utilities Commission	California Commission
CenturyTel, Inc.	CenturyTel
CLEC Coalition Excel Telecommunications, Inc. KMC Telecom Holdings, Inc. NuVox Inc. SNiP LiNK LLC Talk America VarTec Telecom, Inc. XO Communications, Inc. Xspedius LLC	CLEC Coalition
Covad Communications Company	Covad
Cox Communications, Inc.	Cox
Florida Public Service Commission	Florida Commission
Iowa Utilities Board	Iowa Commission
LecStar Telecom, Inc.	LecStar
Mpower Communications Corp.	Mpower
National Association of State Utility Consumer Advocates	NASUCA
New York State Department of Public Service	New York Commission
PAETEC Communications, Inc.	PAETEC
Promoting Active Competition Everywhere Coalition The Competitive Telecommunications Association	PACE/CompTel
Qwest Communications International Inc.	Qwest
Rural Independent Competitive Alliance	RICA
SBC Communications Inc.	SBC
Sprint Corporation	Sprint
The Public Utilities Commission of Ohio	Ohio Commission
United States Telecom Association	USTA
US LEC Corp. TDS Metrocom, LLC	US LEC *et al.*

Focal Communications Corporation Pac-West Telecomm, Inc. Globalcom, Inc. Lightship Telecom, LLC OneEighty Communications, Inc.	
Verizon Telephone Companies	Verizon
Verizon Wireless	Verizon Wireless
WorldCom, Inc./MCI	MCI
Z-Tel Communications, Inc.	Z-Tel

Replies in Pick-and-Choose Proceeding, CC Docket No. 01-338

Replies	Abbreviation
American Farm Bureau, Inc. Anew Telecommunications Corporation d/b/a Call America Creative Interconnect, Inc. Utilities Commission of New Smyrna Beach A+ American Discount Telecom, LLC	AFB *et al.*
Arizona Corporation Commission	Arizona Commission
AT&T Wireless Services, Inc.	AT&T Wireless
BellSouth Telecommunications, Inc.	BellSouth
Birch Telecom, Inc.	Birch
Cablevision Lightpath, Inc.	Lightpath
CenturyTel, Inc.	CenturyTel
CLEC Coalition KMC Telecom Holdings, Inc. NuVox Inc SNiP LiNK LLC Talk America XO Communications, Inc. Xspedius LLC	CLEC Coalition
Cox Communications, Inc.	Cox
National Association of State Utility Consumer Advocates	NASUCA
Nextel Communications, Inc.	Nextel
SBC Communications Inc.	SBC
Sprint Corporation	Sprint
T-Mobile USA, Inc.	T-Mobile
US LEC Corp. TDS Metrocom, LLC Focal Communications Corporation Pac-West Telecomm, Inc. Globalcom, Inc. Lightship Telecom, LLC OneEighty Communications, Inc. Cavalier Telephone	US LEC *et al.*
Verizon Telephone Companies	Verizon
WorldCom, Inc./MCI	MCI

Comments in the Mpower Flex Contract Proceeding, CC Docket No. 01-117

Comments	Abbreviation
Association of Communications Enterprises	ASCENT
AT&T Corp.	AT&T
BellSouth Corporation	BellSouth
Covad Communications Company	Covad
Focal Communications Corporation	Focal
Qwest Corporation	Qwest
Sprint Corporation	Sprint
Verizon Telephone Companies	Verizon
WorldCom, Inc.	WorldCom
Z-Tel Communications, Inc.	Z-Tel

Replies in the Mpower Flex Contract Proceeding, CC Docket No. 01-117

Replies	Abbreviation
Association of Communications Enterprises	ASCENT
Association for Local Telecommunications Services	ALTS
AT&T Corp.	AT&T
Focal Communications Corporation	Focal
Mpower Communications Corp.	Mpower
United States Telecom Association	USTA
Verizon Telephone Companies	Verizon
WorldCom, Inc.	WorldCom

APPENDIX B
FINAL RULES

PART 51 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 51 – INTERCONNECTION

1. Section 51.809 is amended by revising the section heading, paragraphs (a), (b), and (c) to read as follows:

§ 51.809 Availability of agreements to other telecommunications carriers under section 252(i) of the Act.

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) The provision of a particular agreement to the requesting carrier is not technically feasible.

(c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.

STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338) Second Report and Order

One of the Commission's most important goals is to advance competition that is meaningful and sustainable, and that will eventually achieve Congress' goal of reducing regulation and promoting facilities-based competition. As carriers continue their migration away from unbundled network elements and toward increased reliance upon network elements they own and control, they will require more specialized interconnection agreements with incumbent LECs. Today's decision removes a rule that has thwarted those individualized agreements.

Specifically, we adopt an "all-or-nothing" rule, in place of the current pick-and-choose interpretation of section 252(i). Through this action, the Commission advances the cause of facilities-based competition by permitting carriers to negotiate individually tailored interconnection agreements designed to fit their business needs more precisely. Consistent with the purpose of section 252(i), it also continues to safeguard against discrimination. Specifically, nothing in our decision diminishes the ability of a requesting carrier to avail itself of the arbitration process clearly set forth in section 252 of the Act.

Preserving parties' ability to contract freely, and indeed encouraging transactions, is not simply an oft-cited legal policy – the 1996 Act makes it our statutory mandate. Our decision today ensures that facilities-based competitors are given a fighting chance to participate in local markets.

STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Second Report and Order in CC Docket No. 01-338 (adopted July 8, 2004).

I strongly support the Commission's decision to bolster incentives for marketplace negotiations by eliminating the "pick and choose" rule. In enacting the Telecommunications Act of 1996, Congress envisioned a sharing regime built primarily upon negotiated access arrangements, rather than governmental mandates. To be sure, the Commission was required to establish default unbundling rules, and state commissions were expected to set UNE prices and resolve interconnection disputes. But Congress anticipated that competitors and incumbents would establish most terms and conditions at the bargaining table, rather than in regulatory tribunals and courtrooms.

Unfortunately, this vision has not been realized. Instead, we have endured eight years of pitched regulatory battles and resource-draining litigation, and industry participants of all stripes agree that incumbent LECs and new entrants almost never engage in true give-and-take negotiations. There are undoubtedly many complex reasons why the Act's implementation took this course, many of which have nothing to do with the "pick and choose" rule. But I believe that the record in this proceeding confirms something I have long suspected: the "pick and choose" rule impedes marketplace negotiations and is not necessary to prevent discrimination. When the Supreme Court upheld the "pick and choose" rule as a valid interpretation of the Act, it recognized that the rule might "significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions)," and suggested that the Commission would be able to change course if that came to pass.[1] That absence of genuine trade-offs is precisely what has occurred, as incumbent LECs have proven reluctant to make significant concessions in negotiations as long as third parties can later come along and avail themselves of the benefit without making the same trade-off as the contracting party.

By requiring that competitors opt into interconnection agreements on an "all or nothing" basis, we ensure that third parties take the bitter with the sweet. In doing so, I am optimistic that we will promote more meaningful negotiations. Given the almost-complete dearth of marketplace deals, this change can only improve negotiations, notwithstanding claims that it will diminish competitors' leverage. In fact, I expect that the continuing application of the statutory duty of good faith, together with competitors' ability to opt into any negotiated or arbitrated agreement (on an all-or-nothing basis), will be sufficient to prevent discrimination.

The reform we adopt today is part of a much broader transformation. The "pick and choose" rule, along with a remarkably expansive unbundling regime, has fostered an expectation that the government will micromanage every aspect of the relationship between an incumbent LEC and its wireline competitors. The courts have now made unmistakably clear that the Commission must impose meaningful limits when adopting new unbundling rules. While I have no doubt that the Commission will continue to mandate the unbundling of bottleneck transmission facilities, it is equally apparent that the concept of maximum unbundling of all elements in all geographic markets cannot be sustained. As we move toward adopting new rules under which competitors will be increasingly required to rely on their

[1] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

own facilities and to differentiate their services, the availability of customized interconnection agreements will be all the more vital. I expect that our elimination of the "pick and choose" rule will help pave the way toward a regime that is more dependent on negotiated access arrangements and less dominated by regulatory fiat.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)*

Eight years ago, the Commission adopted its pick-and-choose rule. It provided structural assurance that interconnection, service and network elements would be available to all carriers at nondiscriminatory rates, terms and conditions. The rule was based on the strongest statutory reading of Section 252(i). It was designed to minimize contracting costs and was grounded in principles of equal treatment.

We have no looming judicial charge that compels us to depart from our pick-and-choose policy. Quite the contrary: the pick-and-choose rule was upheld by the Supreme Court five years ago. The highest court characterized the rule as "not only reasonable," but also "the most readily apparent" interpretation of the statute. This is strong stuff for a Commission whose policy pronouncements do not always pass muster with the courts of the land.

I am not convinced that dismantling the pick-and-choose rule and replacing it with an all-or-nothing approach will usher in a new era of negotiation and unique commercial deals. While statements about enhancing give-and-take negotiation have intuitive appeal, their logic here is thin. Trade-off, compromise and concession are good. They are features of any negotiation, including negotiation in a pick-and-choose environment. But in the wireline market, the only wholesaler is also the dominant force in retail competition. I know of no other industry where this is true. It makes contracting difficult. The hurly-burly and give-and-take that go on in so many commercial dialogues are not guaranteed in this one. Take-it-or-leave-it bargaining means competitors will walk away without any wholesale alternatives. To understand this difficulty, look no further than the lack of widespread commercial agreement reached during the months since the *USTA II* decision.

Pulling apart the fabric that supports competition will not speed its arrival. Discarding the pick-and-choose policy will increase the costs of contracting for smaller carriers. It will make it harder for them to compete. The real losers are consumers—residential and small business customers—who will face a dwindling set of choices and more limited competition as a result. For these reasons, I respectfully dissent.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN DISSENTING IN PART AND APPROVING IN PART

Re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 04-164.

Section 252 of the Communications Act establishes a framework for the negotiation and arbitration of interconnection agreements between incumbent carriers and new entrants. Section 252(i) provides a valuable tool for preventing discrimination between competitive carriers and incumbents, by requiring incumbents to make available "any interconnection, service, or network element" to other requesting carriers. Since 1996, the Commission's rules have implemented this provision by affording new entrants the ability to choose among individual provisions contained in publicly-filed interconnection agreements. That approach, called the "pick and choose" rule, was affirmed by the Supreme Court as the "most readily apparent" reading of the statute.

In the realm of our local competition rules, I am reticent to cast aside rules that have been affirmed by the Supreme Court. Maintaining some level of regulatory stability in this sector warrants such an approach. I nonetheless join today's Order to the extent that it provides incumbents and competitors with greater flexibility to develop comprehensive negotiated agreements. As a practical matter, the availability of the pick and choose rule appears to have influenced virtually all negotiations between incumbents and competitors, even if the parties to a specific negotiation did not invoke the pick and choose option. By affording parties the ability to balance a series of trade-offs, we should provide additional incentive for negotiated agreements.

The question remains whether this change will provide sufficient incentive for incumbents and competitors to reach mutually-acceptable agreements. The experience of the past 8 years, and particularly the past few months, has demonstrated how difficult it is for competitors and incumbents to reach negotiated agreements for access to unbundled network elements and other critical inputs. Competitors raise legitimate concerns about whether current market conditions create adequate incentives for both parties. The pick and choose rule has served to balance, to some degree, disparities in market power, and it is difficult to predict the effect of its wholesale elimination.

While I support providing parties with some avenue for reaching agreements outside of the pick and choose framework, I cannot fully support this item. Particularly in light of the Supreme Court's conclusion that our current rule "tracks the pertinent language of the statute almost exactly," I would have supported a more measured approach. For example, the Commission could have adopted its "all or nothing" approach for negotiated agreements, but allowed the limited use of the pick and choose rule for new entrants seeking to include previously-arbitrated provisions in new interconnection agreements. These arbitrated provisions have been reviewed by State commissions for consistency with the Act and our rules, and they do not reflect the give-and-take of purely negotiated agreements. Such an approach, though not compelled by our rules, would be a measured way to grant additional flexibility, now that we have concluded that multiple interpretations of the statute are permissible. Allowing the use of the pick and choose rule for previously-arbitrated issues would also address concerns raised by competitors, some state commissions, and consumer advocacy groups that adopting the "all or nothing" approach would lead to more arbitrations, potentially increasing cost and delay for smaller carriers.

This Commission should be cautious about an approach that may permit parties to delay unreasonably making available even those provisions of interconnection agreements that have been

arbitrated by state commissions. We should at minimum commit to monitoring the implementation of this new approach. Parties forcefully dispute whether the relief we provide here will lead to mutually-acceptable, non-discriminatory agreements or towards greater litigation costs because parties are forced to arbitrate more agreements. The difference in these outcomes is far from academic, but rather will be reflected in the existence and number of options available to consumers of telecommunications services. Our vigilance, and the commitment of our State commission colleagues who will review these agreements, is essential if we are to ensure that consumers continue to enjoy the benefits of choice.

Statement of
Chairman Michael K. Powell

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338) Second Report and Order

One of the Commission's most important goals is to advance competition that is meaningful and sustainable, and that will eventually achieve Congress' goal of reducing regulation and promoting facilities-based competition. As carriers continue their migration away from unbundled network elements and toward increased reliance upon network elements they own and control, they will require more specialized interconnection agreements with incumbent LECs. Today's decision removes a rule that has thwarted those individualized agreements.

Specifically, we adopt an "all-or-nothing" rule, in place of the current pick-and-choose interpretation of section 252(i). Through this action, the Commission advances the cause of facilities-based competition by permitting carriers to negotiate individually tailored interconnection agreements designed to fit their business needs more precisely. Consistent with the purpose of section 252(i), it also continues to safeguard against discrimination. Specifically, nothing in our decision diminishes the ability of a requesting carrier to avail itself of the arbitration process clearly set forth in section 252 of the Act.

Preserving parties' ability to contract freely, and indeed encouraging transactions, is not simply an oft-cited legal policy – the 1996 Act makes it our statutory mandate. Our decision today ensures that facilities-based competitors are given a fighting chance to participate in local markets.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Second Report and Order in CC Docket No. 01-338 (adopted July 8, 2004).

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Unfortunately, this vision has not been realized. Instead, we have endured eight years of pitched regulatory battles and resource-draining litigation, and industry participants of all stripes agree that incumbent LECs and new entrants almost never engage in true give-and-take negotiations. There are undoubtedly many complex reasons why the Act's implementation took this course, many of which have nothing to do with the "pick and choose" rule. But I believe that the record in this proceeding confirms something I have long suspected: the "pick and choose" rule impedes marketplace negotiations and is not necessary to prevent discrimination. When the Supreme Court upheld the "pick and choose" rule as a valid interpretation of the Act, it recognized that the rule might "significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions)," and suggested that the Commission would be able to change course if that came to pass.[1] That absence of genuine trade-offs is precisely what has occurred, as incumbent LECs have proven reluctant to make significant concessions in negotiations as long as third parties can later come along and avail themselves of the benefit without making the same trade-off as the contracting party.

By requiring that competitors opt into interconnection agreements on an "all or nothing" basis, we ensure that third parties take the bitter with the sweet. In doing so, I am optimistic that we will promote more meaningful negotiations. Given the almost-complete dearth of marketplace deals, this change can only improve negotiations, notwithstanding claims that it will diminish competitors' leverage. In fact, I expect that the continuing application of the statutory duty of good faith, together with competitors' ability to opt into any negotiated or arbitrated agreement (on an all-or-nothing basis), will be sufficient to prevent discrimination.

The reform we adopt today is part of a much broader transformation. The "pick and choose" rule, along with a remarkably expansive unbundling regime, has fostered an expectation that the government will micromanage every aspect of the relationship between an incumbent LEC and its wireline competitors. The courts have now made

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unmistakably clear that the Commission must impose meaningful limits when adopting new unbundling rules. While I have no doubt that the Commission will continue to mandate the unbundling of bottleneck transmission facilities, it is equally apparent that the concept of maximum unbundling of all elements in all geographic markets cannot be sustained. As we move toward adopting new rules under which competitors will be increasingly required to rely on their own facilities and to differentiate their services, the availability of customized interconnection agreements will be all the more vital. I expect that our elimination of the "pick and choose" rule will help pave the way toward a regime that is more dependent on negotiated access arrangements and less dominated by regulatory fiat.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
DISSENTING

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)*

Eight years ago, the Commission adopted its pick-and-choose rule. It provided structural assurance that interconnection, service and network elements would be available to all carriers at nondiscriminatory rates, terms and conditions. The rule was based on the strongest statutory reading of Section 252(i). It was designed to minimize contracting costs and was grounded in principles of equal treatment.

We have no looming judicial charge that compels us to depart from our pick-and-choose policy. Quite the contrary: the pick-and-choose rule was upheld by the Supreme Court five years ago. The highest court characterized the rule as "not only reasonable," but also "the most readily apparent" interpretation of the statute. This is strong stuff for a Commission whose policy pronouncements do not always pass muster with the courts of the land.

I am not convinced that dismantling the pick-and-choose rule and replacing it with an all-or-nothing approach will usher in a new era of negotiation and unique commercial deals. While statements about enhancing give-and-take negotiation have intuitive appeal, their logic here is thin. Trade-off, compromise and concession are good. They are features of any negotiation, including negotiation in a pick-and-choose environment. But in the wireline market, the only wholesaler is also the dominant force in retail competition. I know of no other industry where this is true. It makes contracting difficult. The hurly-burly and give-and-take that go on in so many commercial dialogues are not guaranteed in this one. Take-it-or-leave-it bargaining means competitors will walk away without any wholesale alternatives. To understand this difficulty, look no further than the lack of widespread commercial agreement reached during the months since the *USTA II* decision.

Pulling apart the fabric that supports competition will not speed its arrival. Discarding the pick-and-choose policy will increase the costs of contracting for smaller carriers. It will make it harder for them to compete. The real losers are consumers—residential and small business customers—who will face a dwindling set of choices and more limited competition as a result. For these reasons, I respectfully dissent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	

ERRATUM

Released: July 20, 2004

By the Chief, Competition Policy Division:

1. The Second Report and Order in the above-captioned proceeding, released on July 13, 2004, FCC 04-164, is corrected as indicated in this Erratum. The corrected version will be published in the FCC Record. In addition, the corrected version will be posted on the Commission's website.

2. In paragraph 2, in the third sentence, we replace "can" with "may."

3. In paragraph 10, in the third sentence, we insert "that" after "and" and before "an."

4. In paragraph 18, in the eighth sentence, we insert "as" after "serves."

5. In paragraph 26, in the sixth sentence, we delete a "," after "burdensome."

6. In paragraph 71, in the first sentence, we insert "*Second*" after "the" and before "*Report.*"

7. In footnote 5, we insert "*See*" before "47."

8. In footnote 6, we delete a ";" and insert a "," after "*1996*" and before "*Interconnection.*"

9. In footnote 8, we insert "16138-39," after "at."

10. In footnote 12, we insert ", CC Docket Nos. 01-117, 01-338, 96-98, 98-147 at 1" after "FCC" and before "(filed Oct. 14, 2003)."

11. In footnote 14, we delete a "," after "98-147."

12. In footnote 14, we delete "(Verizon Jan. 17, 2003 *Ex Parte* Letter)" after "(filed Jan. 17, 2003)."

13. In footnote 17, in the fourth sentence, we delete "which" after "but."

14. In footnote 30, we insert as space after "*v.*" and before "*Iowa.*"

15. In footnote 34, we insert "a" after "later interpretation of" and before "statute."

16. In footnote 46, we replace "Federal Communications Commission" with "FCC."

17. In footnote 73, we replace "*supra*" with "*infra*."

18. In footnote 93, we replace "For" with "for" after "Counsel" and before "Cox."

19. On page 39, in Appendix B listing the final rules, in section 51.809(c), we replace "252(f)" with "252(h)."

20. Accordingly, IT IS ORDERED that the Second Report and Order in the above-captioned proceeding IS AMENDED as set forth above.

WIRELINE COMPETITION BUREAU

Michelle M. Carey
Chief, Competition Policy Division